A

Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–6 OF 2006(M)
ABDUL HAMID MOHAMAD, ARIFIN ZAKARIA AND AUGUSTINE PAUL FCJJ
11 MAY 2007

C *Equity — Property, equitable interest in — Fair and just — Statutory prohibition — Factual change of ownership — Whether courts may disregard statutory provisions to arrive at a decision — Malacca Lands Customary Rights Ordinance ss 3, 29*

D *Land Law — Customary land — Transfer of right — Restrictions in interest and transfer — Property sold to unauthorised person — Property acquired and compensation paid — Whether transfer valid and heirs entitled to compensation — Malacca Lands Customary Rights Ordinance ss 3, 29*

E Li Keng Liat was the registered owner of land in Malacca which was subject to the provisions of the Malacca Lands Customary Rights Ordinance ('the Ordinance'). When he passed away in 1903, Lee Chim Giang was registered as the executor of his estate. In 1935, Tan Tai Tip, 'purchased' the said MCL land from Lee Chim Giang. Section 3 of the Ordinance provided that no transfer of any land subject to the F Ordinance was valid unless such transfer was made either (a) to a Malay domiciled in Malacca; or (b) to a person issued with a certificate as qualified to hold such land. Section 29 of the Ordinance further provided that no sale of any interest in any such land was valid unless made in accordance with the Ordinance. Tan Tai Tip was neither a Malay nor a person issued with a certificate as qualified to own or to hold an interest in such land. Thus the land remained registered in the name of Lee Chim G Giang, since deceased, as executor of the estate of Li Keng Liat. Tan Tai Tip and his kin entered into and remained in quiet and uninterrupted possession of the land, built houses and lived on the land, paid all quit rent and other dues, used the land for the planting of padi and vegetables and the rearing of cattle, and were in possession of the document of title to the land. There was no claim to the land by H any beneficiary of Li Keng Liat. In 1981 the land was acquired by the State Director of Lands and Mines. Following an inquiry compensation in the sum of RM616,146 was awarded to 'Li Chim Giang estate of Li Keng Liat' as 'owner' for the acquisition of the said land. Other smaller awards were made to some people, including a son of Tan Tai Tip, who were in possession of the said land, as 'persons interested' in the I land. Administrators of the estate of Tan Tai Tip filed a suit against the defendants, the current executors of the estate of Li Keng Liat, deceased, claiming entitlement, as the owner, to the award of compensation. The trial judge gave judgment for the plaintiffs. The Court of Appeal dismissed the defendants' appeal and the defendants appealed to the Federal Court. Two questions were certified for the consideration of the Federal Court, namely: (1) when land under the Ordinance has been acquired,

does a prohibition in the Ordinance continue to apply to decide to whom compensation shall be paid?; and (2) can the doctrine of fairness be used to override principles of law and the Ordinance? A

Held, answering the first question in the affirmative and the second in the negative and allowing the defendants' appeal with costs: B

(1) The trial judge allowed the respondents to rest their case on exclusive possession. But the compensation in question was for 'owner' of the land not for the occupiers, who had in any event been compensated separately. So, the issue really was: who is the 'owner'? The courts below appeared to have missed this point (see para 13). The basis of the claim by the plaintiffs was that Tan Tai Tip had purchased the land. The plaintiffs could not extricate themselves from the alleged purchase as the basis of the right to the land which is now represented by the compensation money. To hold that the plaintiffs were entitled to the compensation was to recognise Tan Tai Tip's ownership right, which in turn meant recognising the 'sale' (see para 46). C D

(2) The alleged sale took place in 1935. Money was paid and possession was given. No attempt whatsoever was made for Tan Tai Tip, not being a Malay, to be issued with a certificate qualifying him to hold the land. Thus sale could not to be conditional. It is not necessary to consider whether s 3 of the Ordinance allows a conditional sale (see paras 40–41). The Court of Appeal was right that this was a case of an outright sale. This court had no difficulty accepting that there was a sale. But the question was whether the sale was valid or void (see paras 20–21). E

(3) The courts below supported the view that the right to compensation is a different issue altogether from the issue of ownership of the land. The argument that property in land can pass under an illegal and therefore unenforceable contract will defeat the whole purpose of the creation of customary lands and Malay reserve lands. It would amount to giving effect to a transaction clearly prohibited by law. It was wrong to think that this was a one-off case concerning payment of compensation money and that it had no implication on customary lands as a whole (see paras 42–43, 45). F G

(4) Where, as here, land is subject to the Ordinance, the sale thereof to persons unqualified under the Ordinance is not valid. Such a purchaser does not become a landholder under the Ordinance and is not competent to acquire title to the said lands. The alleged purchase by Tan Tai Tip (also not a Malay and not a certificated person) must be held to be invalid (see paras 25, 30); *Pang Cheng Lim v Bong Kim Teck & Ors* [1997] 4 AMR 3717 followed. H

(5) Further since such a purchaser cannot acquire title under the Ordinance, there cannot be any other way by which such a purchaser can acquire it. To allow the purchaser to acquire title by any other method not in accordance with the Ordinance would defeat the purpose of the Ordinance. The Ordinance was enacted for the protection of certain classes of people. Cases on Malay reserve lands were also to the same effect. The fact that the land had been occupied by the others for a length of time did not extinguish the landholders title to the I

said lands. The Federal Court thus answered the first question in the affirmative (see paras 26, 28, 32); *Haji Hamid bin Ariffin v Ahmad bin Mahmud* [1976] 2 MLJ 79 followed, *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 distinguished and *Mistry Amar Singh v Kulubya* [1963] 3 All ER 499 referred.

(6) Before applying English rules of equity the court must first ascertain whether there is in existence any written law in Malaysia that such rules may contravene. Even if there is no such law, the application of such rules is subject to the proviso that they shall be applied only so far as the circumstances permit and/or render necessary. The Ordinance and the Malay Reserve Enactments are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such objective, all the more when the effect of the application of such equitable rules is to give effect to a transaction declared to be invalid by the statute (see paras 52–53); *Ramsden v Dyson* (1866) LR1 HL129 distinguished and *Devi v Francis* [1969] 2 MLJ 169 referred.

(7) The decisions in the courts below were based on what was perceived as fair and just (see para 16). Here it was not just the issue of whether it would be more fair to decide in favour of the plaintiffs or the defendants. The court was faced with an illegal act by both of them, the result of which would cause at least one of them to suffer losses. The court had to deal with the acts of two persons that contravened the written law and which, if given effect to, would defeat the whole purpose of the written law (see para 58). The fact that the land had been acquired by the State made no difference. The land remained customary land until the State authority decide to declare it, or part of it, otherwise (see para 62).

(8) It is true that the courts, through its decisions try to arrive at 'fair and just' results. But it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. Our British colonial masters saw it necessary to make laws to protect the ownership of a class of persons over some areas of land. Laws were thus enacted as a matter of policy. These laws are preserved by the Constitution. If at all these laws need to be amended or repealed, this should, as a matter of policy, be done by the legislature, not by the courts through their decisions. This court thus answered the second question in the negative (see paras 60–63).

[Bahasa Malaysia summary

Li Keng Liat adalah pemilik berdaftar tanah di melaka yang tertekluk kepada peruntukan Ordinan Hak-Hak Tanah Adat Melaka ('Ordinan tersebut'). Apabila beliau meninggal dunia pada tahun 1903, Lee Chim Giang didaftarkan sebagai wasi harta pusakanya. Pada tahun 1935, Tan Tai Tip telah 'membeli' tanah MCL itu daripada Lee Chim Giang. Seksyen 3 Ordinan tersebut memperuntukkan bahawa tiada pindah milik untuk mana-mana tanah yang tertakluk kepada Ordinan tersebut adalah sah kecuali pindah milik itu dibuat sama ada kepada (a) seorang berbangsa Melayu yang menetap di Melaka; atau (b) seorang yang diberikan sijil sebagai layak memegang tanah tersebut. Seksyen 29 Ordinan tersebut juga memperuntukkan bahawa tiada jualan untuk apa-apa kepentingan dalam

mana-mana undang-undang sedemikian adalah sah kecuali dibuat menurut Ordinan tersebut. Tan Tai Tip bukan berbangsa Melayu maupun seorang yang telah diberikan sijil untuk layak memiliki atau memegang suatu kepentingan dalam tanah tersebut. Oleh itu tanah tersebut kekal didaftarkan dalam nama Lee Chim Giang, memandangkan si mati adalah wasi harta pusaka Li Keng Liat. Tan Tai Tip dan dan keluarganya telah memasuki dan kekal dalam milikan yang tenteram dan tidak diganggu atas tanah tersebut, telah membina rumah dan menetap atas tanah tersebut, membayar semua cukai tanah dan lain-lain yang perlu dibayar, menggunakan tanah tersebut untuk menanam padi dan sayur-sayuran dan memelihara ternakan, dan mempunyai milikan untuk dokumen hak milik tanah tersebut. Tiada tuntutan ke atas tanah tersebut dibuat oleh mana-mana benefisiari Li Keng Liat. Pada tahun 1981 tanah itu diperoleh oleh Pengarah Tanah dan Lombong Negeri. Berikutan suatu siasatan pampasan sejumlah RM616,146 telah diawardkan kepada 'Li Chim Giang harta pusaka Li Keng Liat' sebagai 'pemilik' untuk pemerolehan tanah tersebut. Beberapa award kecil lain telah diberikan kepada beberapa orang, termasuklah Tan Tai Tip, yang mempunyai milikan tanah tersebut, sebagai 'orang berkepentingan' dalam tanah itu. Pentadbir-pentadbir harta pusaka Tan Tai Tip telah memfailkan satu guaman terhadap defendan-defendan, wasi-wasi semasa harta pusaka Li Keng Liat, si mati, yang menuntut hak, sebagai pemilik, berhubung award pampasan. Hakim perbicaraan telah memberikan penghakiman menyebelahi plaintif-plaintif. Mahkamah Rayuan telah menolak rayuan defendan-defendan dan mereka pula telah merayu ke Mahkamah Persekutuan. Dua persoalan perlu dipertimbangkan oleh Mahkamah Persekutuan, khususnya: (1) apabila tanah di bawah Ordinan telah diperoleh, adakah larangan dalam Ordinan tersebut digunakan untuk memutuskan kepada siapa pampasan perlu dibayar? dan (2) bolehkah doktrin keadilan digunakan untuk menolak prinsip undang-undang dan Ordinan tersebut?

Diputuskan, menjawab soalan pertama secara positif dan soalan kedua secara negatif dan membenarkan rayuan defendan-defendan dengan kos:

(1) Hakim perbicaraan telah membenarkan responden-responden menggunakan milikan eksklusif untuk kes mereka. Namun pampasan yang dipersoalkan adalah untuk 'pemilik' tanah bukan untuk penghuninya, yang telahpun diberikan pampasan berasingan. Oleh itu, persoalan sebenar adalah: siapakah 'pemilik'nya? Mahkamah bawahan kelihatan telah terlepas perhatian berhubung perkara ini (lihat perenggan 13). Asas tuntutan oleh plaintif-plaintif adalah bahawa Tan Tai Tip telah membeli tanah tersebut. Plaintif-plaintif tidak boleh melepaskan diri mereka daripada pembelian yang dikatakan sebagai asas hak ke atas tanah itu yang sekarang diwakili oleh wang pampasan. Untuk memutuskan bahawa plaintif-plaintif berhak terhadap pampasan adalah untuk mengenalpasti hak ketuanpunyaan Tan Tai Tip, yang bermaksud mengenalpasti 'jualan' tersebut (lihat perenggan 46).

(2) Jualan yang dikatakan itu berlaku dalam tahuan 1935. Wang telah dibayar dan milikan telah diberikan. Tiada percubaan apa sekalipun telah dilakukan agar Tan Tai Tip, yang bukan berbangsa Melayu, diberikan sijil untuk melayakkan beliau memegang tanah tersebut. Oleh itu jualan adalah tidak bersyarat. Adalah tidak perlu dipertimbangkan sama ada s 3 Ordinan tersebut membenarkan suatu jualan bersyarat (lihat perenggan 40–41). Mahkamah

Rayuan adalah betul bahawa ini merupakan satu kes jualan yang nyata. Mahkamah ini tiada kesukaran untuk menerima bahawa terdapat suatu jualan. Namun persoalannya adalah sama ada jualan tersebut sah atau tidak (lihat perenggan 20–21).

(3) Mahkamah bawahan menyokong pendapat bahawa hak untuk mendapat pampasan adalah isu lain sama sekali daripada isu ketuanpunyaan tanah itu. Hujah yang mana hartanah dalam tanah itu boleh dipindahkan di bawah kontrak yang menyalahi undang-undang dan yang tidak boleh dikuatkuasakan akan menggagalkan keseluruhan tujuan pembentukan tanah-tanah adat dan tanah-tanah rizab Melayu. Ini akan mewujudkan satu transaksi yang jelas dilarang oleh undang-undang. Adalah salah untuk berpendapat bahawa kes sebegini adalah berhubung bayaran wang pampasan dan bahawa ia tiada implikasi ke atas tanah-tanah adat secara keseluruhan (lihat perenggan 42–43, 45).

(4) Di mana, seperti di sini, tanah adalah tertakluk kepada Ordinan tersebut, jualan kepada mereka yang tidak layak di bawah Ordinan tersebut adalah tidak sah. Pembeli sedemikian tidak menjadi pemilik tanah di bawah Ordinan tersebut dan tidak kompeten untuk mendapat hak milik ke atas tanah-tanah tersebut. Pembelian yang dikatakan oleh Tan Tai Tip (juga bukan berbangsa Melayu dan bukan orang yang diperakui) hendaklah diputuskan sebagai tidak sah (lihat perenggan 25, 30); *Pang Cheng Lim v Bong Kim Teck & Ors* [1997] 4 AMR 3717 diikut.

(5) Bahkan memandangkan pembeli sedemikian tidak boleh mendapat hak milik di bawah Ordinan tersebut, tiada cara lain yang mana pembeli boleh memperolehnya. Untuk membenarkan pembeli memperoleh hak milik dengan cara lain yang tidak menurut Ordinan tersebut tidak akan memenuhi tujuan Ordinan tersebut. Ordinan tersebut telah digubal untuk melindungi kelas-kelas tertentu. Kes-kes berhubung tanah rizab Melayu juga mempunyai kesan yang sama. Hakikat bahawa tanah itu telah diduduki oleh orang lain untuk masa tertentu tidak melupuskan hak milik pemegang-pemegang tanah ke atas tanah-tanah tersebut. Mahkamah Persekutuan oleh demikian menjawap persoalan pertama secara positif (lihat perenggan 26, 28, 32); *Haji Hamid bin Ariffin v Ahmad bin Mahmud* [1976] 2 MLJ 79 diikut, *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 dibeza dan *Mistry Amar Singh v Kulubya* [1963] 3 All ER 499 dirujuk.

(6) Sebelum menggunakan rukun ekuiti Inggeris mahkamah perlu terlebih dahulu menentukan sama ada wujud undang-undang bertulis di Malaysia yang mungkin bercanggah. Jikapun tiada undang-undang sedemikian, permohonan untuk rukun-rukun tersebut adalah tertakluk kepada proviso bahawa ianya hendaklah terpakai hanya setakat mana keadaan membenarkan dan/atau ia merupakan suatu keperluan. Ordinan tersebut dan Enakmen-Enakmen Rizab Melayu adalah undang-undang yang dibaut dengan objektif khusus. Tiada rujuk ekuiti (atau common law) patut digunakan yang akan menggagalkan suatu objektif, tambahan pula jika kesan permohonan rukun ekuiti akan menyebabkan transaksi itu diisytiharkan sebagai tidak sah oleh statut (lihat perenggan 52–53).

(7) Keputusan-keputusan di mahkamah bawahan adalah berdasarkan apa yang ditanggap sebagai adil dan saksama (lihat perenggan 16). Di sini bukan sahaja berhubung isu sama ada ia lebih adil untuk memutuskan menyebelahi plaintif-plaintif atau defendan-defendan. Mahkamah berhadapan dengan tindakan oleh kedua-dua pihak yang menyalahi undang-undang, yang mana akan mengakibatkan salah satu daripada mereka mengalami kerugian. Mahkamah perlu mengatasi tindakan dua orang yang bercanggah dengan undang-undang bertulis dan yang mana, jika dikuatkuasakan, akan menggagalkan keseluruhan tujuan undang-undang bertulis (lihat perenggan 58). Hakikat bahawa tanah tersebut telahpun diperoleh olah Kerajaan Negeri tidak memberikan apa-apa perbezaan. Tanah itu kekal tanah adat sehingga pihak Kerajaan Negeri memutuskan untuk mengisytiharkannya atau sebahagian daripadanya, sebaliknya (lihat perenggan 62).

(8) Adalah benar bahawa mahkamah, melalui keputusannya cuba untuk membuat keputusan yang 'adil dan saksama'. Namun ia hanya boleh berbuat sedemikian dalam batas-batas perundangan, tidak melalui pertimbangan secara am dan tidak jelas untuk mencapai keadilan dan kesaksamaan. Pihak kolonial Inggeris melihat ianya perlu untuk menggubal undang-undang bagi melindungi ketuanpunyaan kelas-kelas pemilik beberapa kawasan tanah. Undang-undang oleh itu digubal sebagai perkara polisi. Undang-undang tersebut dilindungi oleh Perlembagaan. Jika kesemua undang-undang tersebut dipinda atau dimansuhkan, ini sebagai perkara polisi hendaklah dilakukan oleh badan perundangan, bukan oleh mahkamah melalui keputusannya. Mahkamah ini oleh demikian menjawab persoalan kedua secara negatif (lihat perenggan 60–63).]

Notes

For cases on land, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2683–2686.
For cases on transfer of rights in customary land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2712–2713.

Cases referred to

Devi v Francis [1969] 2 MLJ 169 (refd)
Foo Say Lee v Ooi Heng Wai [1969] 1 MLJ 47 (distd)
Goh Soon Leong v The Commissioner of Lands & Ors [1951] MLJ 201 (refd)
Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud [1976] 2 MLJ 79 (folld)
Mistry Amar Singh v Kulubya [1963] 3 All ER 499 (refd)
Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141 (refd)
Pang Cheng Lim v Bong Kim Teck & Ors [1997] 4 AMR 3717 (folld)
Ramsden v Dyson (1866) LR 1 HL 129 (distd)
Tinsley v Milligan [1993] 3 All ER 65 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Kedah Malay Reservation Enactment (No 63) s 6(2)
Kelantan Malay Reservation Enactment 1930 ss 4, 6(1), 19
Land Acquisition Act 1960 ss 2, 8, 12, 16
Malacca Lands Customary Rights Ordinance (Cap 125) ss 3, 29

National Land Code (Penang And Malacca Titles) Act 1963 ss 94, 104, 105(c), 108(1)(a)

(Andrew TS Goh & Khairil) for the appellants.
(Yau Jiok Hua & Co) for the respondents.

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] A dispute arose regarding the entitlement to the sum of RM616,146 which was awarded as compensation for the acquisition by the State of a piece of land known as MCL 150 Lot 51 Mukim of Klebang Besar, Melaka ('the said MCL land'). The High Court gave judgment for the plaintiffs (the respondents herein). Appeal by the defendants (appellants herein) was dismissed by the Court of Appeal.

[2] This court, on 6 March 2006 granted leave to the appellants to appeal to this court on two questions:

(i) when land under Malacca Lands Customary Rights Ordinance (Cap 125) ('the Ordinance') has been compulsorily acquired by the Government under the Land Acquisition Act 1960, does the prohibition in the Ordinance still apply to decide to whom the compensation shall be paid?; and

(ii) can the doctrine of fairness be used to override the principles of law and the Ordinance?

[3] We heard this appeal on 6 February 2007 and reserved our judgment. This is my judgment.

[4] The said MCL land was held under the Ordinance. Under the Ordinance, only a Malay domiciled in Malacca or a person holding a certificate from the Governor-in-Council of Malacca is qualified to hold an MCL land and no transfer of an MCL land 'shall be valid unless it is made to an individual qualified to become customary landholder.'

[5] The registered owner of the MCL land is one Lee Chim Giang as the executor of the estate of Li Keng Liat, who died in 1903. Lee Chim Giang has also passed away. The present Appellants are the current executors of the Estate of Li Keng Liat, deceased.

[6] In 1935, Tan Tai Tip, also since deceased, 'purchased' the said MCL land from Lee Chim Giang who was then the executor of the Estate of Li Keng Liat. Tan Tai Tip, was not a Malay nor a person issued with a certificate by the Governor-in-Council to hold or to own the MCL land. In short, he was not a person qualified for an MCL land to be sold and transferred to. That explains why the land remained registered in the name of Lee Chim Giang, deceased. In this action the Estate of Tan Tai Tip, deceased, is represented by its administrators who are the respondents/plaintiffs.

[7] Without going into detail, I accept the finding of facts of the courts below which is very precisely stated by Abdul Aziz Mohamad JCA (as he then was) in the judgment of the Court of Appeal:

> Since the sale, Tan Tai Tip and his relatives had been in quiet and uninterrupted possession of the land, had built dwelling houses and lived on the land, had paid all quit rent and other dues, had been using the land for the planting of padi and vegetables and the rearing of cattle, and had been in possession of the document of title to the land. Although the land remained registered in the name of Lee Chim Giang as executor of the estate of Li Keng Liat, there was no claim to the land by any beneficiary of Li Keng Liat.

[8] By a proclamation dated 28 October 1981 in Form D under s 8 of the Land Acquisition Act 1960, Pengarah Tanah dan Galian Melaka gave notice that the said MCL land was required for a public purpose, namely 'kawasan perumahan'. In 1982, an inquiry was held pursuant to s 12 of the Act.

[9] By a notice in Form H pursuant to s 16 of the Act dated 10 May 1982, the Collector of Land Revenue, Malacca made the following award by way of compensation in respect of the acquisition of the said MCL land:

1	Li Chim Giang Estate of Li Keng Liat	Tuan Tanah	$616,146
2	Tan Yed Lim	Tuan Rumah	$28,200
3	Teo Seng	Peladang & sebuah rumah	$55,100
4	Tan Ngiap Heng	Orang Pemelihara Lembu	$338,730

[10] It is to be noted that the award contains four different compensations to be made to four different persons. They are, first, to 'Tuan Tanah' (the land owner). The second compensation is paid to Tan Yed Lim. He had erected 'a temporary building' on the said property, paying a nominal rent to Tan Tai Tip, deceased. The third person to whom compensation was paid was Teo Seng. He had rented about five acres of the said property from Tan Tai Tip for planting padi and vegetables. He also occupied about half an acre of the said property on which he built 'a semi-permanent' house, paying a nominal rent to Tan Tai Tip, deceased.

[11] The fourth person to whom compensation was also paid was Tan Ngiap Heng, the son of Tan Tai Tip, deceased and the second plaintiff in the suit. All these facts are to be found in the plaintiff's (respondent's) statement of claim. The compensations made to them must be in their capacity as 'person interested' within the meaning of s 2 of the Land Acquisition Act 1960.

[12] However, the only dispute in this appeal concerns the award made to 'tuan tanah'.

[13] So, the issue really is: who is the 'tuan tanah'? The occupants have been compensated separately. So, the fact that the learned High Court judge, having allowed the Respondents to rest their case on exclusive possession instead of on the (alternative) ground that even if the sale was illegal and void, Tan Tai Tip's estate was entitled to compensation because the contract of sale had been fully executed, but did not decide on it, makes no difference. The compensation in question is for 'tuan tanah' not for the occupiers who have been paid separately. With respect both the High Court and the Court of Appeal appear to have missed this point.

[14] Perhaps, at this stage, I should state the grounds on which the courts below made their respective decisions.

[15] The High Court, in a lengthy judgment, having made findings on a number of issues eg s 3 of the Ordinance allows conditional sale, the sale was not illegal or invalid at its initial stage 'and had not reached the periphery of illegality' and that the illegality, even if there was, 'does not bar any property being passed under an illegal and unenforceable contract,' went on to decide that 'a bare trust could not have been created owing to the nontransfer of the property by valid instruments.' On that ground he would have dismissed the respondents' claim. But, he did not stop there. He went further to apply the concept of equity and proprietary estoppel and relying, inter alia, on the speech of Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129, decided in favour of the Respondents.

[16] The Court of Appeal was of the view that the learned High Court judge 'was entitled to resort to any appropriate principle of law to do justice', even though the court was hesitant 'to label it as considerations of proprietary estoppel.' In short, the court's decision was based on what is perceived as fair and just.

[17] The respondents' claim is premised on the assertion that Tan Tai Tip, deceased had 'purchased' the said land from Lee Chim Giang, one of the sons of Li Keng Liat, deceased — see para 4 of the statement of claim.

[18] Evidence was led to that effect. The learned High Court judge was 'convinced that the land was sold to Tan Tai Tip by the registered owner sometime in 1935 albeit an oral agreement.' However, the learned judge went on to say:

> Of course if the plaintiffs fail to prove the sale and purchase of the said property, or even proved but declared null and void, the defendants would be in a better position though not necessarily the recipient of the compensation money...

[19] The learned judge then went on to consider the provisions of ss 3 and 29 of the Ordinance. He concluded that s 3 does not automatically make a sale of a Malacca customary land to a non-Malay a void transaction but it merely becomes a conditional sale until validated in accordance with the provisions of the Ordinance. He then made a finding that there was 'no evidence which leads to the conclusion that an outright sale did take place.' He then considered the Court of Appeal judgment in *Mustapha bin Osman v Lee Chua & Anor* [1966] 2 MLJ 141 and

concluded that even if the contract was illegal, it did 'not bar any property being passed under an illegal and unenforceable contract.' A

[20] The Court of Appeal was silent on the points decided by the High Court that I had just mentioned. However, in justifying the learned High Court judge's 'resort to any appropriate principle of law to do justice' the Court of Appeal did say: B

> This is a case of an outright sale of land...

[21] So the issue whether there was a valid sale, the effects of ss 3 and 29 of the Ordinance and whether property passes even under an illegal and unenforceable contract in this case are issues that I shall have to deal with. C

[22] I have no difficulty accepting that there was a sale. But the question is whether it is valid or void.

D

[23] Section 3 of the Ordinance provides:

> 1) No transfer of customary land shall be valid unless it is made to an individual qualified to become a customary land-holder.
>
> (2) The following persons shall be deemed to be qualified to become customary land-holders: E
>
> (a) any Malay domiciled in the State of Malacca; and
>
> (b) any person holding a certificate from the Governor in Council of Malacca that he is qualified to hold customary land.

F

[24] Section 29 provides:

> 29. No mortgage or sale of any interest in any customary land in Malacca shall be valid unless made in accordance with this Ordinance.

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[25] The issue had in fact been decided by the Supreme Court in *Pang Cheng Lim v Bong Kim Teck & Ors* [1997] 4 AMR 3717. Delivering the judgment of the court, Wan Adnan Ismail FCJ (as he then was) said:

H

> We agree with the contention of the learned counsel for the plaintiff that as the said lands were subject to the said Ordinance the alleged purchase of the same by the first defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council under s 3(2) of the Ordinance. She was not qualified to become a customary landholder under s 3(1) of the Ordinance. She was therefore not competent to acquire any title at all to the said lands.

I

[26] It was also argued by learned counsel for the defendant/respondent in that case that the defendant's/respondent's mother had obtained title to the said lands by adverse possession. The court held, at p 3740 of the law report:

> If she could not acquire any title under the Ordinance, there could not be any other way by which she could acquire it. To allow her to acquire title by any other method not in accordance with the Ordinance would defeat the purpose of the Ordinance. The Ordinance was enacted for the protection of certain classes of people.

[27] The judgment referred to the Privy Council judgment in *Mistry Amar Singh v Kulubya* [1963] 3 All ER 499 and quoted a large portion of the judgment with approval.

[28] At p 3742, the court further held:

> We do not agree with the learned defence counsel's further contention that the plaintiff's title to the said lands had been extinguished and the said lands had reverted to the State. The plaintiff's mother was the customary landholder of the said land. The plaintiff became the registered proprietor of the said lands under the National Land Code through the distribution proceedings under the 1955 Act which we had found to have been properly held. The fact that the said lands had been occupied by the defendants for a length of time did not extinguish the plaintiff's title to the said lands.

[29] It is also to be noted that in that case the Supreme Court considered the provisions of s 3 of the Ordinance as well as the provisions of ss 104, 105(c) and 108(1)(a) of the National Land Code (Penang And Malacca Titles) Act 1963 ('1963 Act').

[30] A few points arising from that case are worth noting. First, the lands (MCL lands) were previously registered in the plaintiff's mother's name. The Court held that since she was not a Malay she 'must have been issued with a certificate under s 104 (of the 1963 Act — added) in respect of the said lands. Otherwise she would not have been registered as proprietor of the said lands. She was a 'certificated person' under the 1963 Act in respect of the said lands. She was a customary land holder. Her position is similar to Lee Chim Giang in the instant appeal, except that Lee Chim Giang was registered as an executor, which in my view does not make any difference legally. They are both registered proprietors, one as a customary land holder and the other as an executor. The pertinent point is that, the alleged purchase by the defendant's mother in that case who was neither a Malay nor a certificated person was held to be invalid. In my view, similarly in the instant appeal, the alleged purchase by Tan Tai Tip (also not a Malay and not a certificated person) must, on the same ground, be held to be invalid.

[31] It is unfortunate that this case was not referred to by both the High Court and the Court of Appeal in their respective judgments.

[32] Cases on Malay reserve lands are also to the same effect. The position is summarized by Teo Keang Sood and Khaw Lake Tee in their book *Land Law in Malaysia (Cases and Commentary)* (2nd Ed) beginning at p 639 as follows:

> The Malay Reservations Enactments of the respective Malay States seek to secure to the Malays their interest in land...

Any dealing, disposal or *attempt to deal in or dispose of* Malay reserve land in contravention of the Enactments of the respective States are rendered null and void under the respective Enactments. Furthermore, no action for breach of contract shall lie in respect of any such dealing, disposal or attempt and no rent or money paid or valuable handed over is recoverable in court. (Emphasis added.)

[33] The authors cited numerous authorities to support their statements, which I do not intend to go into.

[34] Then, at p 642, the learned authors made similar statements with regard to the Malacca customary land. In fact they paraphrased the provisions of the 1963 Act, in particular ss 94 and 108.

[35] In this respect, I shall only refer to some of the judgments of this court and the former Supreme Court.

[36] In *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79 (FC), one Mahmud bin Samad, a Malay and a registered proprietor of Malay reservation land sold the land to a Siamese lady. Subsequently, the Siamese lady who had since died also sold the land to the plaintiffs who are Malays. The land remained registered in Mahmud's name, who had since died. The plaintiffs as administrators of the Siamese lady's estate sued the administrator of Mahmud's estate for specific performance. The issue in the Federal Court was whether the first sale by Mahmud to the Siamese lady was void. The court held that by virtue of s 6(2) of the Kedah Malay Reservation Enactment (No 63) the purported sale was void ab initio and it could not be enforced by the purchase nor could the purported purchase pass a good title to another even if he be a Malay. Section 6 of the Kedah Malay Reservation Enactment (No 63), considered by the court, reads as follows:

6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise, in any person who is not either a Malay or a Siamese.

(2) Any document or agreement purporting to vest in any other person any right or interest contrary to the provisions of subsection (1) shall be void.

[37] It is to be noted that the Federal Court, in arriving at the decision, disagreed with an earlier judgment of the former Court of Appeal in *Goh Soon Leong v The Commissioner of Lands & Ors* [1951] MLJ 201 in so far as the earlier case had decided that a transfer of a Malay reservation land to a non-Malay is not absolutely prohibited or necessarily void ab initio.

[38] I agree with the Federal Court on that point.

[39] The Federal Court also distinguished *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 (FC) since in that case the agreement was conditional and expressed to be subject to the State Authority allowing the land to be excised under s 4 of the Kelantan Malay Reservation Enactment 1930 or agreeing to declare the Siamese lady a Malay for the purposes of the Enactment under s 19, since such an agreement does not purport to vest in a non-Malay right or interest in Malay Reservation land and, therefore, is not contrary to the provisions of sub-s (1) of s 6 of the Enactment.

[40] In the instant appeal, the alleged sale happened in 1935. 'Purchase price' was paid, possession was given. Both parties had long died. No attempt whatsoever was made for Tan Tai Tip to be issued with a certificate of the Governor-in-Council. In the circumstance, I am unable to see how the learned trial judge could hold the sale to be conditional. On this point, the Court of Appeal is right when it says categorically:

> This is a case of an outright sale...

[41] So, just like *Haji Hamid bin Ariffin & Anor*, this case is distinguishable from *Foo Say Lee*. So, it is not necessary to consider whether the provisions of s 3 of the Ordinance allows a conditional sale. However, at a right time, serious thought should be given to the issue, because, knowing what is happening on the ground, the Malacca Customary land, as well as the Malay reserve lands may be no more than a beautiful but empty package while the contents are enjoyed by people who are prohibited by law to own. The registered proprietor will be left with the liability to pay quit rent, and may be, in tort as the land owner.

[42] This is more so when, as the learned High Court judge had done, he applied the principle in *Tinsley v Milligan* [1993] 3 All ER 65 which was followed by the Court of Appeal in *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141, 'that property in chattels and land can pass under an illegal and therefore unenforceable contract.' That in my view, will certainly defeat the whole purpose of the creation of MCL lands and Malay reserve lands. This, in fact, would be another method of giving effect to a transaction clearly prohibited by law, the very thing this court had warned against in *Pang Chong Lim*. I shall say more on this when dealing with the second question.

[43] The learned trial judge clearly said so and the Court of Appeal appears to support the view that the right to compensation is a different issue altogether from the issue of ownership of the land.

[44] That, as I have said with respect, is missing the issue: the compensation in issue is for the 'tuan tanah', the occupiers having been paid, separately.

[45] I am also of the view that it is wrong to think that this is a one-off case concerning payment of compensation money and that it has no implication on Malay reserve lands as a whole.

[46] The compensation in question is for 'tuan tanah'. The basis of the claim by the plaintiffs is that Tan Tai Tip had purchased the land. The plaintiffs cannot extricate themselves from the alleged purchase as the reason that gives them the right to the land which is now represented by the compensation money. To hold that the plaintiffs are entitled to the compensation is to recognize Tan Tai Tip's ownership right, if not in law, in equity, which in turn means recognizing the 'sale' as having passed the interest in the land to a purchaser. To say that property passes even if the sale is invalid and unenforceable is to defeat completely the purpose of the creation of MCL and Malay reserve lands. That is the effect.

[47] In the circumstance, I would answer the first question in the affirmative.

SECOND QUESTION

[48] The learned trial judge applied the principle of proprietary estoppel, though not pleaded, to decide in favour of the respondents. He also quoted a passage from the speech of Lord Kingsdown in *Ramsden v Dyson* in support of his view. He also referred, inter alia, to s 3(1) of the Civil Law Act 1956 and the case of *Devi v Francis* [1969] 2 MLJ 169 on the applicability of the rules of equity in Malaysia.

[49] The Court of Appeal, though reluctant to use the term 'equitable estoppel', approved the learned High Court judge's 'resort to any appropriate principle of law to do justice even if the principle had not been considered in submission.'

[50] That gives rise to the second question: Can the doctrine of fairness be used to override the principles of law and the Ordinance?

[51] The first point I would like to stress on the provision of s 3(1) of the Civil Law Act 1956 is the restriction imposed by it on the applicability of the English rules of equity. In this respect, I shall focus more on the two conditions, the first to be found in the opening words of the subsection itself and, the second, in the proviso which was omitted by the learned trial judge when he quoted the section in his judgment.

[52] The opening words of s 3(1) reads: 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia …' What it means is that before applying any English rules of equity (as administered on 7 April 1956 in West Malaysia), we must first ascertain whether there is in existence any written law in Malaysia that it may contravene in a particular case. Even if there is no such law, its application is still subject to the proviso:

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[53] The Ordinance and the Malay Reserve Enactments are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such objective. What more when the effect is to give effect to a transaction declared to be invalid by the statute.

[54] Unfortunately, quite often, we find that equitable rules have been applied without considering the restrictions imposed by statute (Civil Law Act 1956). Not only that, the application of the rules have, consciously or unconsciously, been extended to situations beyond the original or earlier situations, which even leads to greater injustice.

[55] Take for example, the case of *Ramsden v Dyson*. First, the passage from the judgment of Lord Kingsdown is part of the dissenting judgment. Secondly, it should be read in the light of the facts of the case. As the case is 140 years old and many will find it difficult to get hold of the law report, I shall reproduce the summary of the facts as found in the head-note of The Weekly Reporter Vol XIV at p 926:

> In 1844 JT wished to build a house, & c, upon a piece of land then belonging to Sir JR, the grandfather of the appellant, in fee. The land was allotted to him, and a certain ground-rent was agreed upon, but no lease or agreement for a lease was executed, according to a usage which prevailed in the R estates, by which persons, without having leases granted to them, but upon an understanding that leases for sixty years, renewable every twenty years, would be granted to such persons whenever they should require such leases, were allowed to build on the said estates. Relying on this usage, and the assurances and promises of the duly authorized agents of the R. estates that, he could have such lease whenever he pleased, and that so long as he paid his ground-rent he was as safe without a lease as with one, as he would never be disturbed in his possession, JT, under the superintendence of these agents, expended large sums of money in erecting buildings on the land allotted to him, and continued to pay the annual ground-rent, as agreed upon.

[56] So, even if we were to prefer the dissenting judgment, it must be read in the light of the facts. Note, in particular, the existence of the usage in relation to that particular estate, the assurance and promises of the duly authorized agents of the estate.

[57] For the purpose of this case, I shall say no more on it. In a proper case, may be we should take a close look at 'the trend' that has taken place in this country, taking into account the provisions of our written law and local practice especially among the rural people in this country and local circumstances.

[58] The pertinent point to note is that, unlike in *Ramsden v Dyson* or other cases, in this case, it is not just the issue of which is more fair to decide in favour of the plaintiffs or the defendants. Here, we are dealing with an illegal act by both of them, the result of which not only will cause one of them to suffer losses. We are dealing with the act of two persons that contravenes the written law and which, if given effect to, will defeat the whole purpose of the written law. Should we apply some rules of equity in such a situation? My answer is in the negative.

[59] In fact, the Court of Appeal was reluctant to use the term 'proprietary estoppel.' What is left is nothing more than some vague rules of fairness. Here again, first, the 'fairness' is only as between the two parties who contracted contrary to the provisions of the written law and to the detriment of the class of people that the law seeks to protect. The bigger picture must not be missed.

[60] It is true that the courts, through its decisions try to arrive at a 'fair and just' results. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. The building may be called 'The Palace of Justice', but the courts it houses are the courts of law.

[61] The British, having colonized 'Tanah Melayu' (as Peninsular Malaysia was then known in the Malay language) leading to the influx of immigrants (this is a historical fact), saw it necessary to make laws to protect the ownership of the Malays over some areas of land. The law was enacted by legislature as a matter of policy. It is preserved by the Constitution. If at all it should be repealed or amended, let it be decided, as a matter of policy, by the legislature, not the court through its decision.

[62] The fact that the land has been acquired by the State and will be used for residential purposes makes no difference. The land remains a customary land until the State authority decides to declare it, or part of it, otherwise. That again is a matter of policy.

[63] In the circumstances, I would answer the second question in the negative.

[64] I would allow the appeal with costs and order that the deposit be refunded to the Appellants.

[65] My learned brothers YA Dato' Arifin Zakaria and YA Dato' Augustine Paul FCJJ have read this judgment and agreed with it.

First question answered in the affirmative and second question in the negative. Defendants' appeal allowed with costs.

Reported by Sivapragasam Kumaran